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NO. 89-1305

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IN THE
Supreme Court of the United States
October Term, 1989

CHARLES BEN HOWELL, et al.,
Petitioners,

v.

THE SUPREME COURT OF TEXAS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' REPLY BRIEF

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QUESTIONS PRESENTED

(1) In deciding that the trial court was without jurisdiction to hear petitioner's complaint, did the Fifth Circuit Court of Appeals err in failing to discuss Pennozil v. Texaco, infra, and;

(2) Did the refusal of the Texas Supreme Court to recuse itself in Petitioner's litigation provide jurisdiction for the Federal District Court's to Intervene by creating a void judgement, and;

(3) Does the judgement below by the Fifth Circuit Court of Appeals conflict with In Re: Highway Truck Drivers and Helpers Local 107, and;

(4) Did the Fifth Circuit use the proper standard of review in reviewing the sanctions ordered by the District Court against the Petitioner?

PARTIES TO THESE PROCEEDINGS

Charles Ben Howell, Petitioner

Supreme Court of Texas, and the following justices thereof, Thomas R. Phillips, Franklin Spears, C.L. Ray, James P. Wallace, Ted Z. Robertson, Wiliam Kilgarlin, Raul Gonzales, Barbara Culver, and Oscar Mauzy, Respondents,
The State of Texas, Respondent
Texas Attorney General Jim Mattox, Respondent
Homecraft Land Development, Inc., Respondent
U S Home Corporation, Respondent
Stewart Title Company, Respondent
Bill Long, Dallas Co. District Clerk, Respondent

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Respondents, Justices Thomas R. Phillips, Franklin Spears, C.L. Ray, James P. Wallace, Ted Z. Robertson, William Kilgarlin, Raul Gonzalez, and Barbara Culver; and The Attorney General of Texas Jim Mattox and the State of Texas hereby request that both petitioner's request for leave to present his supplemental petition for Certiorari and the supplemental petition for Certiorari be denied.

RESPONSE TO REQUEST FOR ALTERNATIVE RELIEF

Should the Court decide not to grant a writ for the purpose of fully deciding the case on the merits, respondent requests that petitioner's request for leave to present his supplemental petition and his supplemental petition requests be denied.

REASON'S WHY THE SUPPLEMENTAL PETITION SHOULD BE DENIED

(1) The Fifth Circuit Court of Appeals was under no constitutional obligation under the circumstances of this case to discuss *Pennzoil v. Texaco, infra*.

Petitioner Howell asserts that the Fifth Circuit Court of Appeals erred in issuing an opinion that did not directly reference the case he considers most important in support of his position, *Pennzoil v. Texaco*, 481 U.S. 1 (1987). He offers no authority for the proposition that the case should have been directly addressed in the court's opinion, stating merely that the case should have been addressed

> For reasons that cannot be fathomed, the Court below has cited and quoted opinions of the Supreme Court dated from 1923 to 1983, but it has bypassed the Supreme

> Court's most recent decision in complete silence (See PA 7-12). (Pet. Supp. Br. p.2)

There are obvious reasons why the Fifth Circuit has chosen not to directly address *Texaco*. First, as Judge Nowlin who decided the case at the District level stated in his opinion:

> The problem with Howell's assertion of *Texaco I* as his "white horse" authority is that his federal case is factually distinguishable from *Texaco's* in a very important manner: unlike *Texaco*, Howell chose to raise his equal protection and due process challenges in the state action. The Second Circuit ruled that *Texaco* could pursue its equal protection and due process arguments in federal court because they had not been presented to or adjudicated by a state court, and they were not inextricably intertwined with the state court claims. That is simply not the case here.

Second, there was no need for the Fifth Circuit to cite *Texaco* since it merely reaffirmed one of the cases it did cite, *D.C. Ct. of Appeals v. Feldman*, 103 S.Ct. 1303 (1983), and provided no new avenue for federal district courts to handle such matters as are implied in this case, that have been resolved in the state courts. The United States Supreme Court stated in *Feldman* that:

> A United States District Court has no authority to review final judgments of a state court in judicial proceedings.

The *Texaco* Court merely supported this position:

> If and when, the Texas courts render a final decision on any federal issue presented by this litigation, review may be sought in this Court in the customary manner.

As we can see, *Texaco* only reaffirmed *Feldman*, providing no new avenue for the petitioner under the facts in this case. One could argue that the opinion provided a potential avenue for a challenge to petitioners who have not raised their federal claims in the state courts:

> Moreover, denigration of the procedural protection afforded by Texas law hardly come from *Texaco* with good grace, as it apparently made no effort under Texas law to secure the relief sought in this case (Citation omitted)...Accordingly, when a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary. *Texaco*, *supra* at 15.

Petitioner, however as noted above, has raised his federal claims in the state courts:

> Because Howell did raise his claim in the state court, allowing a new challenge in federal district court would necessarily require review of a final state court judgment. The *Feldman* analysis does not allow federal court adjudication in this case.

Howell v. Supreme Court of Texas, 885 F.2d 308 (5th Cir. 1989).

Petitioner mischaracterizes the comments of Professor Llewellyn from Common Law Tradition 290(6), when he said the author stated that one of the major functions of opinion writing is to ensure that the parties feel that the case has been "dealt with carefully and fully." The author actually stated that the function was to make sure that it was done "carefully and fairly." We cannot fathom how petitioner has made such a serious mistake about such a simple matter as reading and translating the text of publication.

Petitioner further complains that due process rules applicable to administrative tribunals also apply to federal appellate courts and their opinions, citing *Morrissey v. Brewer*, 408 U.S. 471 (1970); and *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, there are great differences between administrative tribunals and federal appellate courts. The federal appellate process is generally more time consuming, more expensive, and it generally deals with a much wider variety of issues that an administrative tribunal. Again, petitioner's citing of *U.S. v. Forness*, 125 F.2d 928 (2nd Cir. 1942) in an attempt to equate the two processes is misplaced as well as inaccurate in this context. However, even if petitioner's comparison was accurate the Fifth Circuit actions should be upheld because as petitioner would require through *Morrissey* and *Goldberg*, the *Howell* opinion by the Fifth Circuit that is in question actually states the 'reasons for his determination and indicate[s] the evidence he relied on.' *Goldberg v. Kelly*, 397 U.S. 254, 71 (70).

The issues raised by petitioners are addressed in the Fifth Circuit's opinion, although the Court did

not specifically discuss the holding in *Texaco, supra*. The Fifth Circuit could do no more short of allowing petitioner to outline its opinion. As Professor Llewellyn stated, it is more important [than ensuring that the litigants feel that the matter has been addressed carefully and fairly] that the opinions allow the winner, the loser and the whole bar to "get some working idea of what did the scoring for the victory." *Common Law Tradition, supra* at 290. The Fifth Circuit gave us that, and the petitioner should not now be allowed to add additional items to the scorecard. The United States Supreme Court's yearly docket has increased from a total number of 4,212 cases in 1970 to 5,268 cases in 1987, a 23% increase for the nine justices and their staff to handle in a short period of time. *Statistical Abstract of the U.S. 1989, 109th Ed. Dept. of Commerce*. During the same time period the Federal Appeal's Court cases have increased from 11,662 to 35,176, an increase of approximately 200%. *Statistical Abstract, supra*. This is an incredible workload for the 168 circuit court judges in the United States, and petitioner would complain that his major case was not discussed. Our federal courts are already overburdened, we will only exacerbate this problem by allowing attorneys to invade the province of the federal appellate courts to write their own opinions. See *Posner*, The Federal Courts: Crisis and Reform, 74 California Law Review 649 (1986).

(2) The Refusal of the Texas Supreme Court to Recuse Itself in Petitioner's litigation was not an unconstitutional act and did not provide jurisdiction for the Federal Courts to Intervene by creating a Void Judgment.

Petitioner is abusing the federal judicial process by continuing with this litigation. Originally petitioner followed the correct route and

sought a writ to the United States Supreme Court, and this was denied. *Howell, supra* at 310. He then decided to reword his complaint in an attempt to invoke the jurisdiction of the federal district courts. He now claims that the Texas Supreme Court's decision not to recuse itself is void, so the federal courts are justified in intervening. However, petitioner begs the question in making this argument. First, the justices are constitutionally disqualified only if they have a pecuniary interest in the case and none was ever shown. *Aetna v. Lavoi*, 475 U.S. 813 (1986). Second, the judges have never been otherwise disqualified, so the judgment rendered by them is not void though it arguably could be voidable if the justices could otherwise be disqualified. Finally, we must note that the previously cited Supreme Court decisions of *Texaco* and *Feldman* should control the disposition of this issue. See also *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281; *Rooker v. Fidelity Trust Co.*, 261 U.S. 114 (1923); and *Carbonell v. Louisiana Dept. of Health and Human Resources*, 772 F.2d 185 (5th Cir. 1985).

(3) The Judgment below by the Fifth Circuit Court of Appeals in this cause does not conflict with *In Re: Highway Truck Drivers and Helpers Local 107*, and hence there is no conflict between the circuits.

Petitioners submits that the Fifth Circuit Court of Appeals decision in this matter conflicts with *In Re: Highway Truck Drivers and Helpers Local 107*, 888 F.2d 293 (3rd Cir. 1989). However, his analysis is clearly flawed because the Third Circuit Court's decision in that case is clearly in line with the Fifth Circuit decision in *Howell*. The Truck Drivers Union filed a petition for voluntary bankruptcy after a jury verdict held it liable for "damages sustained in a shooting incident on

January 25, 1980, at a plant at which members of Local 107 were on strike and picketing." The judgment was rendered for $1.3 million dollars in favor of the Gajowski creditors. The State Supreme Court upheld this judgment after an automatic stay provision prohibited the Union from taking further action, the bankruptcy court (and subsequently the federal district court on appeal) lifted the stay and permitted the Union to contest the Supreme Court decision. Upon reconsideration of the question of the Union's liability the State Supreme Court reversed its decision and held that the Union was not liable for the damage award. The Third Circuit held that the district court was without authority to review this decision:

> Because the "judicial proceedings [of any court of any state] shall have the same full faith and credit in every court within the United States. . .as they have by law or usage in the courts of such state . . .from which they are taken" under 28 U.S.C. § 1738, we conclude that the validly entered judgment of the Pennsylvania Supreme Court is conclusive upon the parties in the matter of state law and must also be conclusive in relation to these federal proceedings. See, *e.g.*, *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 3 L.Ed. 411 (1813) (discussing the conclusiveness of state court judgments in relation to federal proceedings under the federal statute enacted in 1790, existing today in substantially the same form at 28 U.S.C. §1738). To hold otherwise would allow the district court to nullify retroactively a validly entered state court judgment, thereby emasculating the fundamental doctrines of federalism and comity.

> Moreover, a valid state court judgment cannot be enjoined or otherwise upset by a federal court on grounds that would not be available in the state court. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4469, at 668 (1981), citing *American Sur. Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98 77 L.Ed. 231 (1932) (dismissing a federal action to enjoin enforcement of the state judgment on combined grounds of claim preclusion and full faith and credit). Because the issue of the bankruptcy court's alleged abuse of discretion could not be reviewed by the state court, and because a pending federal appeal on that issue could not interfere with the state court's jurisdiction of its own proceedings, the validly entered state court judgment cannot now be enjoined or otherwise upset by a federal court. "The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts." *American Sur. Co. v. Baldwin*, 287 U.S. at 166, 53 S.Ct. at 101.

Truck Drivers, supra at 299.

Additionally, we must add that the Gajowski creditors, like the petitioners in this cause, specifically requested that the federal courts void a state court decision and this request was denied. *Truck Drivers, supra* at 298 n.7. The note in this opinion referenced to in petitioner's brief says nothing about void judgments, only that sometimes purely federal questions involving state litigation

can be handled by state courts, not issues such as are involved in this cause. *See Truck Drivers, supra* at 299, n.9.

(4) The Fifth Circuit properly used the abuse of discretion standard of review in reviewing the sanctions ordered by the District Court against the Petitioner.

Petitioner complains that the Fifth Circuit should independently determine if "petitioner presented a sufficiently meritorious legal argument to insulate him from the imposition of sanctions" before upholding the sanctions, rather that review them under an abuse of discretion standard. However, it does appear that this is the procedure followed by most other circuits as well. See *Westmoreland v. CBS, Inc*, 770 F.2d 1168 (D.C. Cir. 1985); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Stevens v. Lawyer's Mutual Liability Insurance Company*, 789 F.2d 1056 (4th Cir. 1986); and *Bass v. Southwestern Bell*, 817 F.2d 44 (8th Cir. 1987). Petitioner cites *Danik v. Hartmarx*, 875 F.2d 890 (D.C. Cir. 1988) to support his position that the abuse of discretion standard is not the proper standard of review of Rule 11 sanctions. However, the D.C. Court of Appeals in that case merely reaffirmed the abuse of discretion standard, even in cases which were dismissed prior to the ordering of sanctions. *Danik, supra*. "When the district court, without explanation, awards as a sanction an amount no greater than the costs and attorneys' fees incurred by a party moving under Rule 11 and the award is challenged as excessive, only the very rarest case could justify our finding its decision an abuse of discretion." *Danik, supra* at 897. This language is not meant to indicate that the abuse of discretion standard is inappropriate for cases where the sanctions themselves and not just the amounts awarded thereunder are challenged. The Court is simply saying that

upholding the amount of fees under the application of this standard is much easier when only the amount of fees is invoked since by disputing only the amount one must acknowledge their propriety. There is nothing to support petitioner's contention that the judgment is void. In fact the decision probably is not even voidable under Texas law. *See Steph v. Scott*, 840 F.2d 267 (5th Cir. 1988).

The petitioner should be aware of the requirements for Federal District Court intervention. *See Howell v. Thomas*, 566 F.2d 469 (5th Cir. 1978); *Howell v. State Bar of Texas*, 674 F.2d 1027 (5th Cir. 1982); *Howell v. State Bar of Texas*, 710 F.2d 1675 (5th Cir. 1983); and *Howell v. State Bar of Texas*, 843 F.2d 205 (5th Cir. 1988).

The Court should not grant, vacate and remand this case to the appeals court for a further investigation of these matters. A GVR order in this case will only cause undue burdens on the Court in years hence.

CONCLUSION

Petitioner's request is without merit and should be denied completely.